Supreme Court, U.S.
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No. 02-0488

In The Supreme Court of the United States

DAVID KALAN,

Petitioner,

v.

THE CITY OF ST. FRANCIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER QUESTIONS PRESENTED

Pursuant to Sup. Ct. R. 15.2, respondent objects to the question presented by the petition because it seeks consideration of questions not appropriately arising from, or otherwise accurately reflecting, the proceedings or the holdings below. If this court grants the petition, respondent submits that the following are the more accurately phrased questions:

1. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING PETITIONER'S FED. R. CIV. P. 60B MOTION WHERE PLAINTIFF PROVIDED NO SUPPORT FOR HIS MOTION AND WAITED OVER FIVE YEARS TO BRING THE MOTION?

2. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR INJUNCTION WHERE PETITIONER PROVIDED NO SUPPORT FOR HIS MOTION AND MEETS NONE OF THE CRITERIA FOR AN INJUNCTION?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondent submits that it is a governmental entity and, therefore, no additional disclosure needs to be made.

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STATEMENT OF THE CASE

Respondent cannot accept Petitioner's statement of the case because it omits or otherwise misstates pertinent procedural facts and sets forth purported "undisputed" facts that are misleading. Sup. Ct. R. 15.2 and Sup. Ct. R. 24.2. The following matters should be considered by the court in ruling on the petition.

A. COURSE OF PROCEEDINGS

On December 17, 1992, David Kalan (hereinafter "Petitioner") filed a *pro se* action alleging the City of St. Francis (hereinafter "Respondent") violated his civil rights. Therefore, the Petitioner's case was before the district court pursuant to 28 U.S.C. § 1331.

On December 28, 1992 and February 1, 1993, Petitioner and Respondent consented to United States Magistrate Judge's jurisdiction. On July 26, 1993, Magistrate Judge Bittner ruled that Petitioner's action was barred under the doctrine of *res judicata* and granted the Respondent's summary judgment and awarded sanctions in the amount of $1,000.00.

Seven years later, on April 13, 2000, Petitioner filed his motion for relief from judgment pursuant to Fed. R. Civ. P 60(b)(5) and (6). On July 6, 2000, Magistrate Judge Gorence denied the Motion. On July 27, 2000, Petitioner filed a notice of appeal of the July 6, 2000 denial of his Rule 60 Motion. The Seventh Circuit appointed *amicus* to represent Petitioner's interest regarding its jurisdiction under the Magistrates Act, 28 U.S.C. § 636(c). On December 17, 2001, the Seventh Circuit determined that it did

not have jurisdiction because Petitioner had not specifically stipulated to Magistrate Gorence hearing the matter, dismissed the appeal and remanded the case to the trial court. *Kalan v. City of St. Francis*, 274 F.3d 1150 (7th Cir. 2001).

On January 25, 2002, Petitioner filed a new motion in the district court, this one for injunctive relief. On February 5, 2002, the Respondent filed its new brief in opposition to Petitioner's Rule 60 Motion with the district court judge, the Honorable J.P. Stadtmueller. Petitioner replied on February 8, 2002. Respondent filed a brief in opposition to Petitioner's Motion for injunctive relief on February 25, 2002. The district court issued its decision on March 25, 2002 denying all the Petitioner's motions. The Petitioner filed its notice of appeal and docketing statement with the Seventh Circuit on April 5, 2002. The matter was briefed and the Seventh Circuit summarily affirmed Judge Stadtmueller's decision on July 9, 2002. Petitioner filed a Petition for Writ of Certiorari on September 25, 2002.

B. STATEMENT OF FACTS

In November 1989, the Petitioner received numerous citations from the Respondent, the City of St. Francis, because of maintenance of properties he owned in the City of St. Francis. When Respondent could not resolve the ordinance violations with Petitioner, it commenced an action against him. On August 27, 1990, City Municipal Judge Michael J. Novak found the Petitioner guilty on 31 counts of City maintenance code violations and fined him $35,000.00, plus court costs, for a total judgment against Petitioner in the amount of $37,375.00. Petitioner, who was represented by counsel, appealed the Municipal Court judgment to the Milwaukee County Circuit Court, seeking

a jury trial. The appeal, Case No. 91-CV-00469, was assigned to Milwaukee County Circuit Court Judge Louise M. Tessmer. On May 8, 1991, Judge Tessmer denied Petitioner's motion seeking dismissal of Respondent's complaint rejecting his contention that the ordinance at issue was invalid.

On March 31, 1991, the Respondent commenced an action against Petitioner in Milwaukee County Circuit Court alleging that Petitioner violated the restrictive covenant and terms of a building permit on one property and violated a building permit and had a lack of an occupancy permit on another property. The Respondent's action, which was designated as Case No. 91-CV-007608, was assigned to Milwaukee County Circuit Court Judge George A. Burns.

Judge Burns conducted a settlement conference with the parties. The conference resulted in a stipulated judgment that Petitioner's appeal in Case No. 91-CV-00469 and the City's action in Case No. 91-CV-007608 would be dismissed subject to specific conditions. Petitioner, represented by counsel, agreed to the terms of the stipulation for judgment and, upon extensive questioning by Judge Burns, acknowledged that he understood the terms of the stipulation and that his agreement was voluntary. On October 28, 1991, in accordance with the stipulation between the parties, judgment was entered in Case No. 91-CV-07608. On November 21, 1991, the City's Motion to dismiss Case No. 91-CV-00469 was granted by oral decision of Judge Tessmer. On December 22, 1992, Petitioner filed a *pro se* motion to reopen the judgment entered in Case No. 91-CV-007608, which was denied at a February 1, 1993 hearing. Petitioner did not appeal that denial or move to reopen Case No. 91-CV-00469.

On December 7, 1992, Petitioner, who was proceeding *pro se*, commenced an action in the United States District Court for the Eastern District of Wisconsin alleging that Respondent violated his constitutional rights. During a pretrial conference held by Magistrate Judge Bittner on January 26, 1993, Respondent stated its intent to pursue Fed. R. Civ. P. 11 sanctions against Petitioner if he proceeded with the action. After discussion, Petitioner agreed to dismiss the action on its merits. Counsel for St. Francis confirmed the agreement to dismiss the case in writing and forwarded a stipulation for dismissal to Petitioner for signature. On February 5, 1993, however, Petitioner "changed his mind," and the parties each filed Motions for summary judgment and sanctions. Magistrate Judge Bittner issued a decision on the summary judgment Motions and Motions for Fed. R. Civ. P. 11 sanctions filed by Petitioner, as well as the Respondent, on July 26, 1993. Magistrate Judge Bittner applied the doctrine of *res judicata* to the cross Motions for summary judgment and denied Petitioner's Motion and granted Respondent's Motion. Magistrate Bittner granted the Respondent's Motion for sanctions in the amount of $1,000.00 against Petitioner and denied Petitioner's Motion against Respondent.

Petitioner filed a Motion for relief from the judgment pursuant to Fed. R. Civ. P. 60(b)(5) and (6) on April 13, 2000. Petitioner sought relief from the judgment entered in this case by U.S. Magistrate Judge Robert L. Bittner on July 26, 1993. The parties had previously consented to United States Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c) and local Rule 13.05(a) (E.D. of Wis.) while the original action was pending. Originally, Magistrate Judge Gorence denied Petitioner's Rule 60 Motion.

On July 27, 2000, Petitioner filed his notice of appeal of the July 6, 2000 denial of his Rule 60 Motion. The Seventh Circuit appointed *amicus* to represent Petitioner's interest regarding its jurisdiction under the Magistrate Act.

On December 17, 2001, the Seventh Circuit determined that it did not have jurisdiction because Petitioner did not stipulate to Magistrate Gorence, specifically, hearing the matter, dismissed the appeal and remanded to the trial court. On January 25, 2002, Petitioner filed a new Motion for injunctive relief. Judge Stadtmueller issued his decision on March 25, 2002 denying all Motions filed by Petitioner.

Judge Stadtmueller denied Petitioner's Rule 60(b) Motion for two reasons. First, that Petitioner presented no evidence, analysis or argument whatsoever that entitles him to relief. Second, that Petitioner had not brought his Motion within a reasonable time. The district court denied Petitioner's Motion for an injunction because he failed to establish any element of the necessity for an injunction.

The Seventh Circuit summarily affirmed Judge Stadtmueller's decision.

REASONS FOR DENYING THE WRIT

A. NEITHER THE COURT OF APPEALS' NOR THE DISTRICT COURT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT OR OTHER COURTS BECAUSE PETITIONER PROVIDED NO BASIS FOR HIS MOTION.

The district court and Seventh Circuit properly denied Petitioner's Rule 60 motion because he provided no support for his motion. Both courts also agreed that too much time had passed from the decision of the court to bring the Motion with no explanation for delay.

Petitioner seeks review of the Seventh Circuit's decision based on his contention that various decisions conflict with some other decisions of this court or some other court. Petitioner makes this claim without reference to specific authority. The decisions are uniform on this issue.

The courts are uniform in their view that a Rule 60 movant must come forward with legal and factual support for his request. *Thorn v. Harrisburg Trust Company*, 330 F.2d 34 (10th Cir. 1964), *cert. denied*, 85 S. Ct. 611, 379 U.S. 646, 13 L.Ed.2d 551 (1965); *Sutherland v. Fitzgerald*, 291 F.2d 846, 847 (10th Cir. 1961); *Barnes v. American Broadcasting Company*, 259 F.2d 858 (7th Cir. 1958), *cert. denied*, 79 S. Ct. 727, 359 U.S. 946, 3 L.Ed.2d 679 (1959); *Patel v. Lutheran Medical Center, Inc.*, 775 F. Supp. 592, 598 (E.D.N.Y. 1991); *Frank v. New Amsterdam Casualty Co.*, 27 F.R.D. 258, 260 (Pa. 1961); *In re Petition of Pui Lan Yee*, 20 F.R.D. 399, 400-401 (D.C. Cal. 1957); *In re Cantwell*, 17 B.R. 639 (Pa. Bankr. 1982). If the Petitioner seeks to open a judgment, he must produce credible

factual allegations to establish a meritorious defense; if he fails to sustain his burden, the petition to open the judgment must be denied. *Carriage Properties, Inc. v. Arrington*, 152 F.R.D. 488, 490 (E.D. Pa. 1994). Therefore, there can be no argument that the ruling is in conflict with any decision of this court or any of the circuit or district courts.

B. THE DECISIONS OF THE DISTRICT COURT AND SEVENTH CIRCUIT THAT TOO MUCH TIME HAS PASSED TO BRING A RULE 60 MOTION DO NOT CONFLICT WITH ANY DECISION BY THIS COURT OR ANY OTHER.

Judge Stadtmueller found that Petitioner did not bring his Motion within a reasonable time. The Seventh Circuit affirmed this decision. As shown above, Petitioner waited over five years to bring this action. The Petitioner then filed moving papers that included no reason for the five-year delay. If there were any error regarding the judge's decision, Petitioner knew about it on the date the court's order was issued.

The courts have uniformly held that excessive delays may preclude Rule 60(b)(5) and (6) relief. The failure to promptly file motions is viewed unfavorably when the movant had knowledge of the facts which later forms the basis of the complaint. *See Delzona Corp. v. Saks*, 265 F.2d 157 (3rd Cir. 1959) (where movant possessed facts complained of eighteen months delay too long); *Morris Stash Starrett Products Co. v. Steccone*, 205 F.2d 244 (9th Cir. 1953) (22 months); *Gilmore v. Hinman*, 191 F.2d 652, 653 (D.C. Cir. 1951) (16 months not a "reasonable" time); *Sunbeam Corp. v. Charles Appliances, Inc.*, 119 F. Supp. 492, 494 (S.D.N.Y. 1953) (29 months delay so unreasonable as to preclude relief); *Rhodes v. Houston*, 418 F.2d 1309,

1311 (8th Cir. 1969), *cert. denied*, 90 S. Ct. 1382, 397 U.S. 1049, 25 L.Ed.2d 602 (1970) (6 years too long).

In the Petitioner's case, the event that precipitated the filing of the Rule 60 Motion allegedly occurred on February 6, 1995. Petitioner filed his Motion on April 3, 2000, over 5 years after the event that gave rise to the Motion. Petitioner's Motion papers are devoid of explanation for the delay in seeking relief.

The district court carefully considered the Petitioner's Motion. The Petitioner failed to establish that he was entitled to relief from the judgment pursuant to Fed. R. Civ. P. 60(b). Moreover, even if the Petitioner had established that the circumstances in this case fell within the general parameters of Rule 60(b)(5) and/or (6), the Petitioner would also have to establish that his Motion was brought within a "reasonable" time. Although the Motion brought under these circumstances are not subject to an enumerated time limit, the Rule requires that they be brought "within a reasonable time period." The courts have been clear, five years is entirely too long.

C. THE DENIAL OF THE PETITIONER'S REQUEST FOR AN INJUNCTION IS SUPPORTED BY ALL APPLICABLE LAW.

In order to show that he is entitled to injunctive relief, Petitioner must show that:

1. The case has some likelihood of success on the merits;

2. He has no adequate remedy at law and that without the injunction he will suffer irreparable harm;

3. Any irreparable harm the City of St. Francis will suffer is outweighed by the harm Kalan will suffer if the injunction is not granted;

4. The public interest requires granting the injunction.

Nalco Chemical Co. v. Hydro Technologies, Inc., et al., 984 F.2d 801, 802 (7th Cir. 1993).

Petitioner cannot make out any of these factors. First, he has no likelihood of success on the merits. As shown above, there is no basis for his request for relief under Fed. R. Civ. P. 60. Second, there clearly is a remedy available at law. In fact, all of the items that Petitioner requests are remedies of law. Similarly, there appears to be no irreparable harm that Petitioner will suffer. A money judgment being issued against him does not constitute irreparable harm. *Gulf & Western Corp. v. Craftique Productions, Inc.*, 523 F. Supp. 603, 607 (D.C.N.Y. 1981). Similarly, the granting of monetary sanctions against him does not constitute irreparable harm. Third, because Petitioner will not suffer irreparable harm, there can be no findings that the harm he will suffer will outweigh any harm to the Respondent. Finally, the public interest does not support Petitioner's position. In fact, the public's interest in the finality of judgments greatly outweighs any harm allegedly suffered by the Petitioner. Petitioner has pointed to no law contrary to that correctly followed by the district court and the Seventh Circuit anywhere in the country. Petitioner also failed to enumerate any basis for his motion.

The standard for granting or denying a preliminary injunction was announced and followed by the district court and the Seventh Circuit in this case and is consistent with the law as outlined by the courts. *Nalco Chemical Co.*, 984 F.2d at 802; *O'Connor v. Board of Education of School Dist. No. 23,* 645 F.2d 578, 580 (7th Cir. 1981), *cert. denied,* 102 S. Ct. 641, 454 U.S. 1084, 70 L.Ed.2d 619 (1981); *Plain Dealer Publishing. Co. v. Cleveland Typographical Union No. 53,* 520 F.2d 1220 (6th Cir. 1975), *cert. denied,* 96 S. Ct. 3221, 428 U.S. 909, 49 L.Ed.2d 1217 (1976). The standard is well known, well accepted and has been consistently followed by the district court and the Seventh Circuit here.

D. THE DECISIONS OF THE DISTRICT COURT AND THE SEVENTH CIRCUIT DO NOT RAISE IMPORTANT FEDERAL QUESTIONS.

As shown above, the questions presented in this petition are relatively garden-variety application of law to fact. The grounds for the court's decision of whether the Respondent has provided sufficient basis for a Fed. R. Civ. P. 60 motion are well known and were followed by the district court and the Seventh Circuit. The courts that reviewed this decision used well known, well accepted precedent to determine that Petitioners five-year delay precluded granting his motion. Similarly, the courts that have reviewed Petitioner's request for an injunction followed well known and frequently announced legal standards in denying Petitioner's motion. The Petitioner's failure to come forward with any basis for his request does not raise an important question for this Court's review.

CONCLUSION

In sum, the Petitioner provides no evidence or basis on which the district court could grant his Rule 60 motion or the Seventh Circuit could overturn that decision. The legal standard followed by the Seventh Circuit and the Eastern District of Wisconsin fully complies with the law previously announced by this Court and other courts. Finally, Petitioner has clearly presented no important federal question for which it would be necessary for this court to rule.

This court's denial of Mr. Kalan's petition may give finality to this decade long dispute. The denial of the petition will send to Mr. Kalan the same message the Eighth Circuit sent in *Rhodes*. "We hope – and we say this with intended kindness – that Mr. Rhodes will not further deplete his energies and substance on these causes which were final and lost long ago." *Rhodes*, 418 F.2d at 1311.

Respectfully Submitted,

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